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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: THE RIGHT TO A FAIR TRIAL

National practices related to the right to a fair trial: Report of the Secretary-General

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Introduction

1. In its resolution 1992/21, entitled "Right to a fair trial", the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested the Special Rapporteurs on this question, Mr. S. Chernichenko and Mr. W. Treat, to submit to the Sub-Commission at its forty-fifth session a fourth report analysing national practices in regard to a fair trial, including information received in reply to the questionnaires. Pursuant to this request, the Special Rapporteurs prepared their fourth report containing a summary of the information received, principally from non-governmental organizations and bar associations, concerning national laws and practices relating to the right to a fair trial in a number of countries (E/CN.4/Sub.2/1993/24/Add.2).

2. In that report, the Special Rapporteurs indicated that they lacked the capacity to assess the veracity of the materials they had received. For this reason, the Special Rapporteurs requested the Secretary-General to transmit the report to the Governments concerned and to ask for comments from those Governments, which the Special Rapporteurs would seek to reflect in future documents.

3. Pursuant to that request, the Secretary-General, on 12 July 1993, addressed on behalf of the Special Rapporteurs 59 States and invited them to review the material relating to their countries and to submit any comments or suggestions they may wish to make.

4. By 10 June 1994, replies have been received from the following States: Bangladesh, Belgium, Canada, Chad, China, Germany, Iraq, Italy, Jordan, Kuwait, Myanmar, Nepal, Niger, Republic of Korea, Senegal and United Kingdom of Great Britain and Northern Ireland.

5. The present report contains a summary of the substantive replies received. Any additional replies will be reproduced in addenda to the present document.

COMMENTS RECEIVED FROM STATES

1. Bangladesh

[Original: English]
[27 October 1993]

1. Paragraph 8: It is a fact that article 35 (5) of the Constitution of the People's Republic of Bangladesh forbids torture, inhuman or degrading punishment or treatment. In 1991 prisoners were not abused in Dhaka Central Jail. The fact was that in December 1990 convicted prisoners of Dhaka Central Jail illegally pressurized Jail Authority for release. On 29 December 1990 they attacked jail employees, set fires in different rooms and started fleeing by leaping over the jail boundary. At that crucial moment, the jail authorities had no other alternative than to open fire. Three prisoners were killed in that incident. After that incident Government on several occasions discussed with the prisoners about their illegal demands. But the unruly prisoners continued with their malicious activities like breaking of doors, windows, etc. On 15 February 1991 they took the Chief Executive Officer of Jail hostage and virtually took the internal administration into their hands. Total lawlessness was prevailing in the jail. Finding no other alternative, on 8 April 1991 jail wardens and police jointly entered into jail. Between 8 and 10 April 1991 no prisoner was killed. It is also not a fact that 2,000 prisoners were burnt with scalding water and tear-gas. The information that over 120 prisoners had their limbs methodically broken before being transferred to other prisons is absolutely false.

2. Paragraph 52: The information about a specific time limitation to try cases by magistrates and mid-level judges is correct. This has been done to avoid dilatory trials which sometimes run into years, thus defeating the very purpose of justice.

3. Paragraph 79: In Bangladesh, the Penal Code, the Cruelty to Women (DP) Ordinance 1983 and the Dangerous Drugs Act 1988 prescribed the death penalty for a very limited number of offences of a grave nature. The death penalty is pronounced by District/Special Judges, and requires review and confirmation by the High Court. Besides, the accused may file an appeal to higher courts. He can also beg mercy to the Honourable President. The number of death sentences actually carried out in Bangladesh is very small. For example, between 1990-1992 only six executions took place. In Bangladesh public opinion, in general, favours the death penalty. Very recently a small portion of educated people/intellectuals and a few other organizations were talking about the abolition of the death penalty.

4. Paragraph 42: The Special Powers Act 1974 (SPA-74) was promulgated with a view to reduce the occurrence of offences of a very grave nature, which are related to State's vital economic and financial interests and maintenance of law and order in the society. Persons detained under the Act have the following legal safeguards available to them:

(a) Communication by the detaining authorities of the grounds of detention to the detainee within 15 days from the date of his arrest;

(b) The detainee has the inherent right to submit a writ petition before the High Court through a lawyer of his own choice;

(c) The detainee has the right to appoint on his behalf any lawyer to submit application to the High Court against his detention order under section No. 497 of the Criminal Procedure Code, 1898;

(d) The detainee has the right to appeal to the Ministry of Home Affairs as well as the concerned District Magistrate to review his case;

(e) There is an Advisory Board constituted under the SPA comprised of three members. The Chairman and one other member of this board are judges of the High Court and the third member is a very senior officer of the Government. The Advisory Board hears the detainees within 170 days of detention individually, following the same procedures as a regular bench of High Court. After review of each individual case, the Advisory Board sends its recommendations to the Government. These recommendations are binding on the Government;

(f) The lawyer, including the relatives of the detainee (not more than five) are allowed to meet the detainee once every fortnight.

5. From the above it is clear that Special Powers Act 1974 does not contradict article 33 (1) of the Constitution of the People's Republic of Bangladesh.

6. The total number of persons held in custody in the ordinary jails of the country under the Special Powers Act is 1,047 as on 31 July 1993. The number of detainees under the Act has been progressively falling since the return of democracy to Bangladesh in 1992.

2. Belgium

[Original: French]
[23 August 1993]

1. With regard to persons held in pre-trial detention, it is necessary to point out that the law unequivocally lays down the principle of separation of accused and convicted prisoners, with accused prisoners being held in local detention centres, whereas convicted prisoners are held in prisons. As occurs in most States, however, the lack of detention infrastructures had led to this principle being ignored: persons being held in pre-trial detention are not actually separated from people serving a prison term. But this "cohabitation" takes place only when the inmates are using collective facilities (cafeteria, recreational area, religious services, access to library ...), since accused prisoners and convicted prisoners do not share the same cells.

2. No comments are necessary regarding police custody, except perhaps to say that the spirit of the law would have been better conveyed by stating that the law requires action by a judge (who hears the arrested person and informs him of the charges against him) within 24 hours of the arrest.

3. On the question of the qualifications for jurors no comments are called for.

3. Canada

[Original: English]
[10 September 1993]

1. Paragraph 49: The second sentence in this paragraph should be replaced with the following:

> "In Canada, for example, legal-aid attorneys are provided for those charged with specified serious offences and wherever there is a likelihood of imprisonment or loss of livelihood."

2. Paragraph 107: The latter part of the third sentence should be amended to read:

> "... as well as ensuring an opportunity for the accused juvenile to consult with counsel or a parent prior to the giving of any statement."

4. Chad

[Original: French]
[February 1994]

1. Paragraph 90: Contrary to what is stated in the document, there is no restriction on the right of every convicted person or complainant to appeal or to apply for review of a decision by a lower court claimed to be harmful to him, and nowhere in the 1967 Chadian Code of Criminal Procedure currently in force is it provided that the right to appeal or to apply for review of a judicial decision is abridged during times of national emergency or governmental instability.

2. There is only one branch of justice in Chad, in accordance with the 1967 Code of Criminal Procedure: the judiciary, which has two levels:

(a) The first level comprises the justices of the peace and the court divisions and courts of first instance, which have one sitting judge assisted by a court clerk or deputy clerk. Judges at this lower level hear civil cases which are subject to appeal and where compensation up to a certain amount may be awarded to the party claiming damages, with application to a higher court not being necessary;

(b) The second level consists solely of a court of appeal located at N'Djamena, comprising several divisions and headed by a presiding judge and his counsellors. This court of appeal considers, de facto and de jure, judgements that are vitiated by error. It plays the role of a court of cassation in France or a supreme court in Senegal. The time allowed for appeal is 10 days from the date of the judgement in criminal cases and two months in civil cases.

3. There are, however, ordinary criminal courts which hear cases not subject to appeal, but in respect of which the convicted person is given the opportunity to apply for review or a presidential pardon, as appropriate.

4. As we have seen, the allegations according to which remedies in Chad are subject to political restrictions are false and completely groundless.

5. As for the court martial mentioned in the document in question, this emergency court has just been abolished (Acts Nos. 3 and 4 of 20 September 1993 abolishing the emergency courts) in accordance with the recommendations of the Conférence nationale souveraine pour respecter l'esprit de cahier de charges.

6. Paragraph 104: It is true that the 1989 Constitution was suspended by the new authorities who came to power in 1990, but there have been absolutely no reports of restrictions on released detainees in challenging their arrest or detention. What is certain is that some detainees who had taken advantage of the disturbances to abscond were caught while others were not. This must have caused those who were caught to feel that they had been discriminated against, which led the Government to amnesty all the prisoners who had embezzled public funds, in respect of criminal, but not civil, charges. Political and civil proceedings are under way against those responsible for arbitrary detentions and harassment of peaceful citizens prior to 1 December 1990.

5. China

[Original: Chinese]
[8 November 1993]

1. About the first reference, in paragraph 18 of the report, articles 38-42 of the Code of Criminal Procedure provide for five different kinds of coercive measures - subpoena, bail pending trial, house supervision, detention and arrest. The first three kinds of coercive measure do not completely restrict the freedom of the person. The conditions under which an accused may be placed under arrest or detention are strictly regulated by law as per articles 40 and 41 of the Code of Criminal Procedure.

2. The time-limit for hearing a criminal case is also prescribed by the same Code. In addition, the Standing Committee of the People's Congress on 7 July 1984 promulgated a set of Supplementary Rules on the Length of Criminal Procedure. According to these Rules, serious cases involving organized gangs of criminals in flight which cannot be dealt with within the time-limit prescribed by article 9, paragraph 1, and articles 125 or 142 could, with special sanction from and by decision of a provincial, regional or municipal procuratorate, have their investigatory detention period extended by one month. The Supplementary Rules also stipulate that should an inquiry on an accused detained pending trial cannot be completed with the prescribed time-limit and if the detainee can be released on bail or placed under house supervision without endangering society, some such alternative coercive measure may also be taken. This new alternative period does not count as part of the legal inquiry, which, however, must continue without interruption.

3. All this shows that China's law prescribes not only specific time-frames but also very clear requirements on the handling of court cases.

4. About the second reference, as pointed out in paragraph 20 of the report, China's Constitution and laws guarantee the right of citizens to challenge, accuse or impeach any government agency or official for illegal transgression or misconduct. Confronted with such citizen's complaint or charge, the competent authority has the responsibility to take on the case and initiate a factual inquiry. The case cited by the report is but one example of such court action according to the Criminal Code and the Constitution.

5. About the third reference (in para. 25 of the report) article 110, paragraph 1, subparagraph 2, of the Code of Criminal Procedure stipulates that the people's court handling a case must send a copy of the indictment by the people's procuratorate to the accused seven days prior to the opening of the trial. This is the minimum time required for such a notice to enable the lawyer of the accused to prepare for the trial. In actual practice, the court usually would notify the accused soon after it had received the indictment from the procuratorate and decided to try the case. Generally this would be about one month prior to the opening of the trial. If the accused or the lawyer of the accused feels that the time is not enough to prepare for a fair trial, a delay could be requested. Under the circumstance, as long as the delay does not exceed the limit prescribed by law, such request would be routinely granted by the court.

6. Germany

[Original: English]
[31 August 1993]

The third sentence of paragraph 49 should read as follows:

"In Germany, counsel is appointed in all cases before the district court; in cases before the county court, counsel is appointed only in the following circumstances: if serious charges are involved; if a professional licence may be suspended; if the defendant has spent three or more months in custody; if the order of custody in a psychiatric hospital for the preparation of a psychiatric examination comes into consideration; if the previous defence counsel has been discharged by the court because he or she is suspected of involvement in the offence charged; if extraordinary complex factual or legal situations are involved; and if it is evident that the defendant cannot defend himself."

7. Iraq

[Original: Arabic]
[19 October 1993]

1. With regard to paragraph 8 of the report, which refers to an allegation by a non-governmental organization that the Government of Iraq used widespread torture against Kuwaiti prisoners and members of its Kurdish and Shi'a population in 1991, we wish to state that the Government of the Republic of Iraq, while deploring such unfounded, biased and politically

motivated allegations and accusations, which are intended to besmirch Iraq's reputation in international forums, has already affirmed on more than one occasion that it is not holding any Kuwaiti prisoners. The Government of Iraq has cooperated fully with the International Committee of the Red Cross and the League of Arab States through their representatives who have paid several visits to Iraq to search for such prisoners. The general allegation to the effect that torture has been used against members of the Kurdish and Shi'a population is merely an attempt to heap up accusations against Iraq with a view to the achievement of specific political aims. Such accusations should be based on specific occurrences and should mention dates and identifiable names if they are to be regarded as objective and credible. Iraq has already requested that the bodies making these allegations should provide it with the names of the persons concerned or refer to specific cases so that it can investigate and reply to these allegations.

2. With regard to paragraph 58 of the report, we wish to state that articles 53, 54, 55 and 141 of the Code of Criminal Procedure stipulate that the court competent to hear an offence and try the person accused of its commission is the court within the geographical jurisdiction of which the offence was committed. However, article 142 of the same Code stipulates that, by way of exception to the above-mentioned provision, the hearing of a particular case or the trial of a particular defendant may be transferred, by decision of the Court of Cassation or by order of the Minister of Justice, from the court vested with geographical jurisdiction to another court if so required for security reasons, such as the need to protect the defendant from possible acts of reprisal against him or the need to facilitate the investigation and trial proceedings in the interests of justice.

3. Concerning paragraph 72 of the report, the stipulation in article 224 of the Code of Criminal Procedure and article 159 of the Code of Civil Procedure to the effect that decisions taken by the criminal and civil courts must be substantiated means that those courts must specify the grounds on which their decisions are based, i.e. they must refer to the legal provisions substantiating their decisions. This system has several advantages: it enables higher courts to scrutinize those decisions and also enables the parties involved in the case to ascertain the grounds on which judgements against them were based so that, in the full light of the facts, they can exercise their legitimate right of appeal, in accordance with the law, against such judgements.

4. With regard to paragraph 76 of the report, article 21, paragraph (b), of the Constitution and article 2, paragraph 1, of the Penal Code stipulate that no person can be tried or punished twice for the same offence and that no person can be punished, under any circumstances whatsoever, for an act which was not legally designated as an offence at the time of its commission. Moreover, it is prohibited to impose a penalty more severe than that prescribed by the legislation in force at the time of the commission of the offence, i.e. legislation cannot be applied retroactively unless it is more favourable to the accused.

5. Concerning paragraph 78 of the report, the provision in the Enforcement Act to the effect that debtors can be imprisoned in order to force them to fulfil their contractual obligations is subject to several conditions such as,

in particular, the stipulation that the debtor must have arbitrarily refused to fulfil his obligation, although capable of honouring it, to the detriment of the creditor. This measure, which is of extremely short duration, can be ordered only by a judge and cannot be renewed for the same reason.

6. With regard to paragraph 107 of the report, the purpose of following simplified and expeditious procedures in juvenile trials is to avoid any adverse psychological effects which the standard procedures might have on juveniles. For example, a juvenile cannot be sentenced in absentia, neither his name nor the nature of his offence can be made public and his offence is not regarded as a precedent to be recorded against him. The purpose of these and other simplified and advantageous procedures is to enable the juvenile to build his future without any psychological complexes, i.e. the Juveniles Act attempts to help the juvenile, in his future life, to forget that he committed an offence.

8. Italy

[Original: French]
[30 December 1993 and
5 January 1994]

1. As regards the Italian system, the wording of paragraph 16 might be misleading and in any event is not quite accurate:

(a) In no case can the judicial police question a person under arrest;

(b) The judicial police cannot question a person at liberty who is under investigation unless defence counsel is present;

(c) The judicial police may question a person who is not deprived of his personal freedom only in those cases where the police themselves have been explicitly and specifically instructed to do so by the Public Prosecutor's Office in charge of the investigation. In any case, the presence of the defence counsel is always required;

(d) With regard to (a) and (b) above, any act executed in violation of these provisions must be considered null and void - giving rise to possible disciplinary sanctions (in cases where the act in question is not also an offence) against the police officer who drew up the act - and therefore cannot be used in the proceedings leading to the judgement. If, on the contrary, the questioning has been conducted in a lawful manner, the statements made may be used and challenged during the proceedings;

(e) In view of (c) above, the Public Prosecutor's Office and the defence counsel may use statements made by the police to challenge a deposition made during the proceedings. In such cases, statements made by the police on the authorization of the Public Prosecutor's Office and in the presence of the defence counsel are noted in the file of the proceedings, if they have been used to challenge defence statements (for example, they may be

used by the judge in taking his decision). The provisions mentioned in (c) and (e) were introduced by Decree-Law No. 306 of 8 June 1992. The original version of the new Code (1988-1989) did not permit the use of police statements as referred to in (e);

(f) The judicial police may receive statements made voluntarily by a person under investigation (which is different from questioning). However, these statements cannot be used by the judge in his decisions during the proceedings; they can only be used to challenge statements by the accused during the proceedings.

2. With regard to paragraph 72, there are no comments to be made, with the exception of the following: the explanation of the decision must be formulated no more than 15 days following the decision; if the grounds for the decision are complex (number of parties, seriousness of challenging statements), the judge must explain the decision within 90 days (amendment introduced by Decree-Law No. 60 of 1 March 1991).

9. Jordan

[Original: English]
[18 October 1993]

1. The Government of Jordan opposes as untrue the information provided by a non-governmental organization which was included in paragraph 55 of the report of the Special Rapporteurs, according to which in Jordan political opponents had been detained without trial for as long as 15 years. It was indicated in this connection that even when martial law was in force detention did not last a long time, sometimes a few days or weeks. Martial law was superseded a long time ago.

2. With regard to paragraph 102 of the report which mentioned martial law, the Defence Law and the Law on Prevention of Offences, it was stated that martial law was superseded and a new Defence Law was enacted by the new parliament as a way to prevent any misuse of powers, including detention. The Law on Prevention of Offences is rarely used and when used it is only for non-political offences and never for political offences. Detention in accordance with the provisions of this law is very short and the punishment is very light.

3. Any kind of detention ordered by any body can be challenged in a court of law. The independence of the judiciary was established a long time ago.

10. Kuwait

[Original: Arabic]
[17 September 1993]

1. Concerning paragraph 8, the Government wishes to point out that the allegations made against the Iraqi regime in this regard merely constitute an example of the crimes committed by that regime, which has violated all the human rights recognized in international law and in the domestic legislation of civilized States, including the right to life, the right to liberty and

security and the right to a clean and pollution-free environment. That regime also committed the crime of the armed invasion of the State of Kuwait, an act which was prohibited under international law and the full details of which cannot be adequately described in this note in the manner in which they were witnessed and condemned by the international community.

2. Paragraph 50 states that a non-governmental organization reported that, in 1991, appointed counsel received, on average, 10 Kuwaiti dinars per case whereas private practitioners received as much as 10,000 Kuwaiti dinars per case. In response to that statement, we wish to point out that those fees are symbolic and fall within the realm of legal aid, which lawyers have an obligation to provide since it is a duty imposed on them by virtue of their highly respected profession which enjoys a higher status than commercial activities and is far removed from considerations of material gain. All lawyers fulfil this duty. Moreover, article 27 of Act No. 42 of 1964, which regulates the practice of law before the courts, stipulates that, when hearing a case involving a felony in which a lawyer has been appointed, the criminal court must assess the lawyer's fees, which are paid by the Treasury Department of the Ministry of Justice. The State of Kuwait is currently drafting a new bill of law concerning legal aid following the example set by some legislative enactments promulgated by other States in this regard. Many lawyers also defend accused persons, voluntarily and of their own accord, in an endeavour to ensure the triumph of justice and enjoyment of the right to defence, which the State of Kuwait is eager to guarantee to all accused persons.

11. Myanmar

[Original: English]
[22 December 1993]

1. The Code of Criminal Procedure enacted in 1898 and other subsequent relevant Laws provide a comprehensive legal framework and guarantees to ensure that a fair trial is given to every defendant at a law court. There are also legal safeguards against the abuses of legal proceedings during a trial.

2. Following the assumption of State power by the State Law and Order Restoration Council, a new Judiciary Law was enacted by Law No. 2/88 on 26 September 1988. A Supreme Court and other civilian courts at State/Division and Township levels were established in accordance with the law.

3. Article 2 of the Judiciary Law provides that the administration of justice shall be based upon the following seven principles:

(a) To administer justice independently according to law;

(b) To protect and safeguard the interests of the people and to assist in the restoration of law and order and peace and tranquillity;

(c) To educate the people to understand and abide by the law and cultivate in the people the habit of abiding by the law;

(d) To seek peaceful settlement of the cases within the framework of law;

(e) To prosecute in open court unless otherwise prohibited by law;

(f) To guarantee in all cases the right of defence and the right of appeal vested in every citizen under the law;

(g) To aim at reforming moral character in meting out punishment to offenders.

4. Trials of the cases at the law courts at different levels are conducted in strict observance of the Code of Criminal Procedure (1898); defendants can freely exercise the right of defence and the right of appeal vested in them under the law.

5. With regard to the conduct of a fair trial:

(a) Section 252 of the Code of Criminal Procedure provides:

"When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution and the accused shall have the right to cross-examine the complainant (if any) and the witness produced in support of the prosecution."

(b) Section 253 provides:

"If, upon taking all the evidence referred to in section 252, the Magistrate finds that no case against the accused has been made out which would warrant his conviction, he shall discharge the accused."

(c) Sections 254 and 255 provide:

"If, when such evidence has been taken, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence ... the Magistrate shall frame in writing a charge against the accused. The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate shall record the plea and convict the accused thereon."

(d) If the accused refuses to plead guilty, the accused still has the right to request that the witnesses for the prosecution whose evidence has been taken be recalled before the court, and be cross-examined and re-examined by him or his defence counsel under section 256 and section 342. After the accused and the witnesses named by the accused have been re-examined, if the Magistrate finds the accused not to be guilty, he will record an order of acquittal under section 258 (1). If the Magistrate finds the accused guilty, he will convict and pass judgement on the accused.

6. The conduct of trials and the administration of justice are carried out in public courts in strict observance of the above-mentioned seven principles

and the provisions of the Code of Criminal Procedure, the independence of the judiciary is well maintained, and there is absolutely no control or influence exercised by the State Law and Order Restoration Council over the administration of justice by the judiciary.

7. The allegation that a divisional judge who acquitted 50 villagers at a law court was tried and meted out a stiff sentence by a military tribunal is groundless. There has been no occurrence of such a trial in the Union of Myanmar, as alleged.

12. Nepal

[Original: English]
[22 November 1993]

Constitutional provisions of Nepal related to right to a fair trial

"Article 14. Right regarding criminal justice: (1) No person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted or punished for the same offence in a court of law more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

(4) No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law.

(5) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall be denied the right to consult and be defended by a legal practitioner of his choice.

Explanation: For the purpose of this clause, the words "legal practitioner" shall mean any person who is authorized by law to represent any person in any court.

(6) Every person who is arrested and detained in custody shall be produced before a judicial authority within a period of 24 hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such person shall be detained in custody beyond the said period except on the order of such authority.

(7) Nothing in clauses (5) and (6) shall apply to a citizen of an enemy State and nothing in clause (6) shall apply to any person who is arrested or detained under any law providing for preventive detention.

Article 15. Right against preventive detention: (1) No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal.

(2) Any person held under preventive detention shall if his detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law.

Article 23. Right to constitutional remedy: The right to proceed in the manner set forth in article 88 for the enforcement of the rights conferred by this Part is guaranteed.

Article 88. Jurisdiction of the Supreme Court: (1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, Prohibition, and quo warranto: provided that

(a) the Supreme Court shall not be deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army;

(b) except on the ground of absence of jurisdiction, the Supreme Court shall not interfere under this clause with the proceedings and decisions of Parliament concerning penalties imposed by virtue of its privileges.

Article 122. Pardons: His Majesty shall have the power to grant pardons and to suspend, commute or remit any sentence passed by any court, special court, military court or by any other judicial, quasi-judicial or administrative authority or institution."

13. Niger

[Original: French]
[4 October 1993]

The Niger authorities have the following comment to make concerning paragraph 56 of the report:

(a) The criminal law of Niger establishes the principle that trials should be held in public. Proceedings in camera are ordered only if a public hearing is deemed dangerous to public order or morals. (Code of Criminal Procedure, art. 293);

(b) This is why in 1985, for example, persons charged with violating the territorial integrity of Niger were tried by a court martial, an emergency jurisdiction which, at that time, had ordered that the proceedings be held in camera in order to prevent any danger to public order that might disturb the proper conduct of the trial.

14. Republic of Korea

[Original: English]
[21 September 1993]

Paragraph 43 - right to counsel

1. The information is incorrect to the extent that it states that the right to counsel was "usually" restricted in public security cases, and that restrictions on the right to counsel were "especially common" in interrogations by the Agency for National Security Planning and other institutions mentioned in the report.

2. Article 12 (4) and (5) of the Constitution of the Republic of Korea provide an absolute guarantee to all citizens of the right to counsel. This guarantee applies to all cases, including cases arising under the National Security Law. Occasionally in the past, application of this right was deferred, reportedly due either to extreme urgency or scheduling conflicts. Regardless of past practice, recently a Korean court ruled that deferral of the right to counsel is not permissible.

3. In addition, the new Government is committed to the enforcement of human rights; all steps are being taken to assure that basic rights such as the right to counsel, are never again violated.

Paragraph 57 - right to a public trial

4. The information is incorrect to the extent that it implies that the Government employs anti-riot police to intimidate people from attending public security cases, and that the Government restricts the right to a public trial by "often" holding hearings in places to which public access is restricted. The only restriction placed on public attendance at judicial proceedings is based on the size of the hearing rooms. When the facilities are too small to

accommodate all that wish to see a particular hearing, first priority is given to family members, second priority is given to the press, and tickets are issued for the remaining available spaces.

5. It is, however, true that due to disturbances during the trials of certain public security cases riot police have been deployed to maintain order. Their purpose is to protect people, and not to deter the public from attending judicial proceedings.

Paragraph 59 - right to trial and appeal

6. While it is true that the Special Measures Act cited in the report permits trials in absentia, articles 11-1 and 13-1 of this Act, which restricted the right to appeal, were declared unconstitutional on 29 July 1993 by the Constitutional Court. The Government must now undertake the task of rewriting the law. Nevertheless, the Special Measures Act discussed in the report is deemed necessary to maintain domestic security and justice.

15. United Kingdom of Great Britain and Northern Ireland

[Original: English]
[12 August 1993]

1. Paragraph 25: The wording used implies that 24 hours is the minimum period for which a person can be held in custody without charge. In fact, the majority of suspects are dealt with (i.e. released or charged) within 6 hours. The United Kingdom Government would therefore suggest inclusion of the following:

> "However, protracted detention in a police station is unusual. The Royal Commission on Criminal Procedure, upon whose recommendations the Police and Criminal Evidence Act 1984 is largely based, found that three quarters of suspects were dealt with by the police within 6 hours and about 95 per cent within 24 hours."

2. Paragraph 28: We suggest, specifically, inserting after the third sentence the following:

> "A magistrate is permitted to authorize detention for a maximum of 36 hours at one hearing. There must therefore be at least two hearings if the suspect is to be held for the full 96 hours."

Paragraph 28 refers to the power of detention contained in section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989. The Government of the United Kingdom rejects completely the suggestion that this power is used to obtain convictions based on confessions obtained through prolonged detention and intense interrogation. Given the particular gravity of the terrorist threat that we face in the United Kingdom, the Government believes that it is essential that the police have adequate powers to detain and to question those whom they have reason to believe may be involved in terrorism. Terrorist investigations are, by their very nature, often complicated and time-consuming, involving many lines of inquiry and requiring much forensic and other detective work. Without the longer period of detention permitted

under the Prevention of Terrorism Act, the police would face severe difficulties in investigating cases of suspected involvement in terrorist crime. However, the police do not exercise these powers lightly: in the United Kingdom in 1992 only 191 people were detained under the Prevention of Terrorism Act beyond four days (the maximum period of detention permitted under the Police and Criminal Evidence Act (PACE)).

3. There are extensive safeguards for detainees in place under existing legislation. PACE Code of Practice C, for example, on the detention, treatment and questioning of persons by police officers, covers all persons in police detention, including those detained under the Prevention of Terrorism Act. There is also a statutory system for the regular review by a senior police officer of the need for continued detention under the Act during the first 48 hours and detention can only be extended beyond 48 hours on the authority of the Secretary of State and up to a total of 7 days. In Northern Ireland, where the great majority of detentions under the Prevention of Terrorism Act occur, there is continuous closed-circuit TV monitoring by uniformed officers of all interviews in the Holding Centres, where those detained under the Act are held. Interview breaks are required at all normal mealtimes; a period of 8 hours in any 24 must be free from questioning, travel or other interruption; and no interviews are allowed after midnight. There is also an Independent Commissioner for the Holding Centres, whose role is to observe, report and comment on the conditions under which persons are detained and to provide an independent check that the statutory and administrative safeguards for detainees are fully implemented. In addition, the operation of the Prevention of Terrorism Act is reviewed each year by an independent reviewer, whose reports are published. The Act must be renewed annually and is subject to debate in both Houses of Parliament.

4. Paragraph 41: This paragraph discusses (non-specified) research on questioning of suspects outside police stations in the absence of a solicitor. The Codes of Practice issued under the Police and Criminal Evidence Act 1984 require that an accurate record must be made of each interview with a person suspected of an offence, whether or not the interview takes place at a police station. The Government will be giving further consideration to the issue of exchanges which occur between investigating officers and suspects outside the police station, in the light of the recommendations made recently by the Royal Commission on Criminal Justice.

5. The report cites "numerous instances" in which suspects were detained incommunicado and subjected to ill-treatment and oppressive questioning. The circumstances in which access to a solicitor may be delayed are actually very narrowly defined by the Codes of Practice (any breach of which renders an officer liable to disciplinary action and may jeopardize the evidence tendered to the court by the prosecution).

6. Access to a solicitor may be delayed if the person is in police detention in connection with a serious arrestable offence, has not yet been charged with an offence and an officer of the rank of superintendent or above has reasonable grounds for believing that the exercise of this right:

(a) Will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or

(b) Will lead to the alerting of another person(s) suspected of having committed such an offence but not yet arrested for it; or

(c) Will hinder the recovery of property obtained as a result of such an offence.

7. In effect, this means that the officer may authorize delaying access to a specific solicitor only if he has reasonable grounds to believe that that solicitor will, inadvertently or otherwise, pass on a message from the detained person or act in some other way which will lead to any of the above three results coming about. In these circumstances the officer should offer the detained person access to an alternative solicitor.